UNITED
NATIONS

S

Security Council

Distr.
GENERAL

S/1995/910
31 October 1995

ORIGINAL: ENGLISH

LETTER DATED 31 OCTOBER 1995 FROM THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

On 20 October 1995, a Trial Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, presided over by Judge Claude Jorda, issued a decision concerning Dragan Nikolić. By this decision, the Trial Chamber has, among other things, asked me to bring the matter to the attention of the Security Council in my capacity as President of the Tribunal (see annex III, sect. VI).

An indictment against Nikolić was confirmed by a single Judge of the Tribunal on 4 November 1994. On 7 November 1994, the Government of the Republic of Bosnia and Herzegovina and the Bosnian-Serb administration in Pale were each requested to serve that indictment and a warrant of arrest on Nikolić pursuant to rule 55 of the Tribunal's rules. The Republic of Bosnia and Herzegovina indicated that Nikolić was residing in territory outside their control and therefore it could not carry out the Tribunal's request. The Bosnian-Serb administration in Pale has not responded to the Tribunal's request.

The decision, a copy of which I am enclosing, was reached pursuant to a procedure that comes into application only when a State fails to execute an arrest warrant. This procedure is set out in rule 61 of the Tribunal's rules of procedure and evidence (see annex I). It must be stressed that rule 61 is not a trial in absentia and does not provide for a finding of guilt; instead, it only authorizes a Trial Chamber to determine whether reasonable grounds exist to believe the accused has committed the crimes as charged in the indictment.

The decision found that there were reasonable grounds for believing that Nikolić had committed the crimes with which he has been charged. Further, the decision provided for the issuance of an international warrant for Nikolić's arrest to be transmitted to all States (see annex II). Additionally, the decision invited me, as President of the Tribunal, to inform the Security Council. In this regard, I note that rule 61 (E) provides as follows:

If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with article 29 of the Statute, the Trial Chamber shall so certify, in which event the President shall notify the Security Council.

Article 29 (1) of the Tribunal's statute provides that "States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". Article 29 (2) provides that "States shall comply without undue delay with ... an order issued by a Trial Chamber, including ... [an order for] the arrest or detention of persons ...".

May I also recall that, in resolution 771 (1992), the Security Council decided, "acting under Chapter VII of the Charter of the United Nations, that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, shall comply with the provisions of the present resolution, failing which the Council will need to take further measures under the Charter". This decision was reiterated in Security Council resolutions 780 (1992) and 808 (1993).

In view of the foregoing, I am now advising you of the decision. I would be grateful if copies of this letter, together with its attachments, could be provided to States members of the Security Council. I am confident that the Security Council will take whatever measures it deems suitable in the light of this clear disregard by the Bosnian-Serb administration in Pale of its obligation to cooperate with this Tribunal. I need hardly note that, for this Tribunal to succeed in its mandate of prosecuting serious violations of international humanitarian law occurring in the former Yugoslavia, all States in the region - including self-proclaimed entities de facto exercising governmental functions - must comply with their legal obligation to cooperate with the Tribunal.

(Signed) Antonio CASSESE
President

Annex I

[Original: English and French]

RULE 61

PROCEDURE IN CASE OF FAILURE TO EXECUTE A WARRANT

(A) If a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, and the Prosecutor satisfies the Judge who confirmed the indictment that:

(i) he has taken all reasonable steps to effect personal service, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to him to be; and

(ii) he has otherwise tried to inform the accused of the existence of the indictment by seeking publication of newspaper advertisements pursuant to Rule 60,

the Judge shall order that the indictment be submitted by the Prosecutor to his Trial Chamber.

(B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge.

(C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in Sub-rule (A) above.

(D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States.

(E) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to co-operate with the Tribunal in accordance with Article 29 of the Statute, the Trial Chamber shall so certify, in which event the President shall notify the Security Council.

Annex II

[Original: English and French]

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA **Case No. IT-94-2-R61**

IN THE TRIAL CHAMBER

Before: **Judge Jorda, Presiding**
Judge Odio Benito
Judge Riad

Registrar: **Mrs. D. de Sampayo Garrido-Nijgh**

Order of: **20 October 1995**

THE PROSECUTOR

v.

DRAGAN NIKOLIĆ a/k/a "JENKI" NIKOLIĆ

INTERNATIONAL WARRANT OF ARREST AND ORDER FOR SURRENDER

To: All States

THE TRIAL CHAMBER I of the International Criminal Tribunal for the former Yugoslavia

CONSIDERING United Nations Security Council resolution 827 of 25 May 1993 establishing the International Criminal Tribunal for the former Yugoslavia and Rule 61 of its Rules of Procedure and Evidence,

CONSIDERING the indictment submitted by the Prosecutor against Dragan NIKOLIĆ, confirmed by an Order of Judge Odio Benito on 4 November 1994, copies of which are annexed to this warrant of arrest,

CONSIDERING the Decision of the Trial Chamber of 20 October 1995 following the failure to execute the initial warrant of arrest against Dragan NIKOLIĆ, a copy of which is annexed to this warrant of arrest,

HEREBY DIRECTS all States to search for and promptly arrest and transfer to the International Criminal Tribunal for the former Yugoslavia:

name and first name of accused:	Dragan NIKOLIĆ
aliases:	Jenki
date of birth:	1957, at Vlasenica, Socialist Federal Republic of Yugoslavia
family status:	Unknown

/...

last known profession: Electrician - Alpro Aluminium Vlasenica
last known residence: Zarije Sunarica St. - Vlasenica - Republic of Bosnia and Herzegovina

Alleged to have committed at the Sušica camp at Vlasenica during 1992 the following crimes: grave breaches of the fourth Geneva Convention of 12 August 1949
violations of laws and customs of war
crimes against humanity
within the competence of the International Criminal Tribunal for the former Yugoslavia by virtue of Articles 2, 3 and 5 of the Statute,

And to advise the said Dragan NIKOLIĆ, at the time of his arrest, and in a language he understands, of his rights as set forth in Article 21 of the Statute and, *mutatis mutandis*, in Rules 42 and 43 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia which are set out below, and of his right to remain silent, and to caution him that any statements he makes shall be recorded and may be used in evidence. The indictment and the review of the indictment (all documents being annexed to the present warrant) must also be brought to the attention of the accused,

REQUESTS THAT all States, upon the arrest of Dragan NIKOLIĆ, promptly notify the Registrar of the International Criminal Tribunal for the former Yugoslavia, for the purposes of his transfer.

Claude Jorda
Presiding Judge

20 October 1995
The Hague
The Netherlands

Seal of the Tribunal

/...

Appendix

Article 21

Rights of the accused.

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

   a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

   b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

   c) to be tried without undue delay;

   d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

   e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

   f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

   g) not to be compelled to testify against himself or to confess guilt.

Rule 42

Rights of Suspects during Investigation

A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

(i) the right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it; and

(ii) the right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning.

B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Rule 43

Recording Questioning of Suspects

Whenever the Prosecutor questions a suspect, the questioning shall be tape-recorded or video-recorded, in accordance with the following procedure:

(i) the suspect shall be informed in a language he speaks and understands that the questioning is being tape-recorded or video-recorded;

(ii) in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before tape-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;

(iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded;

(iv) the tape shall then be transcribed and a copy of the transcript supplied to the suspect, together with a copy of the recorded tape or, if multiple recording apparatus was used, one of the original recorded tapes; and

(v) after a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect.

Annex III

[Original: English and French]

IN THE TRIAL CHAMBER

Before: Judge Jorda, Presiding
Judge Odio Benito
Judge Riad

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 20 October 1995

PROSECUTOR

v.

DRAGAN NIKOLIĆ a.k.a. "JENKI"

REVIEW OF INDICTMENT PURSUANT TO RULE 61
OF THE RULES OF PROCEDURE AND EVIDENCE

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry

I. INTRODUCTION

1. By a decision dated 16 May 1995, pursuant to Rule 61 (a) of the Rules of Procedure and Evidence ("the Rules"), Judge Odio Benito ordered that the Prosecutor submit to this Trial Chamber for review the indictment against Dragan Nikolić, alleged to have been, during 1992, the Commander of Sušica Camp located in the region of Vlasenica in Bosnia and Herzegovina. Pursuant to Rules 47 and 55, the same Judge had confirmed the indictment on 4 November 1994 and issued a warrant of arrest which to this day has not been executed.

2. The Chamber had the material which was initially submitted to the confirming Judge, but it has also heard in a public hearing during the week of 9 to 13 October 1995 a number of witnesses and alleged victims. The Chamber is now called on to determine the responsibility of Dragan Nikolić as alleged, that is, to determine if there are reasonable grounds for believing that he has committed all or any of the crimes charged in the indictment and, if so, to issue an international warrant for his arrest.

The execution of an international arrest warrant relies upon the obligation on States to cooperate and to render judicial assistance, as provided in Article 29 of the Statute. In effect, all States in the international community will be bound, if the warrant is issued, to cooperate in searching for and arresting the accused, who would in consequence become an international fugitive.

Moreover, should the Chamber consider that the failure to effect service of the indictment and to execute the original warrant of arrest is attributable to a State or, pursuant to the Rules, to a self-proclaimed entity, it may so certify and it may inform the Security Council through the President of the Tribunal.

3. Before reviewing the crimes allegedly committed by the accused, both as to the facts and the legal characterization of those facts, it is appropriate to assess the scope of Rule 61 in the context of its first application. Recourse to Rule 61 means that the Tribunal, which does not have any direct enforcement powers, is not rendered ineffective by the non-appearance of the accused and can proceed nevertheless.

The review by a panel of Judges, sitting in a public hearing, of an indictment initially confirmed by a single Judge, reinforces both the rights of the accused and enhances the solemnity and gravity of the Judges' decision. The Rule 61 procedure, which is initiated by the Prosecutor, cannot be considered a trial <u>in absentia</u>; it does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal. However, the rights of alleged victims should not be denied; the Rule 61 proceedings provide them with the opportunity to be heard in a public hearing and to become a part of history.

II. THE CRIMES

4. The crimes described hereunder were allegedly perpetrated during 1992 in eastern Bosnia in the municipality of Vlasenica and, for the most part, within the Sušica camp, a former military installation converted by Bosnian Serbs into a detention camp and of which Dragan Nikolić is alleged to have been the commander. The detainees were held in one of two main buildings within the camp, referred to as the hangar.

A. The offences charged

5. The Chamber now examines the evidence which has been tendered in support of the indictment in order to determine whether there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment.

The indictment against Dragan Nikolić consists of 24 counts. Each count relates to one set of facts for which the Prosecutor has proposed alternative legal characterizations. For the reasons discussed below, each count, with two exceptions, will here be presented under the most appropriate description, that is crimes against humanity.

1. Murder

(a) The murders of Durmo Handžić and Azim Zildžić 1/

6. A number of witness statements, both written and oral, of persons detained in Sušica camp reported the murder of Durmo Handžić and Azim Zildžić. Those testimonies indicate that, allegedly, one evening in June 1992, Dragan Nikolić and some camp guards approached the hangar and called out Durmo Handžić and Azim Zildžić. Shortly after leaving the hangar, these two men were subjected to serious physical assaults for more than 45 minutes by Dragan Nikolić and the guards. They were punched and kicked and struck with truncheons and rifle butts. Some prisoners actually witnessed parts of these assaults and others heard the victims cry out, scream, moan and beg for an end to their torture. Durmo Handžić and Azim Zildžić were then brought back into the hangar. According to the eyewitness testimony of other prisoners, their bodies were covered with bruises and their clothes were soiled and torn. Azim Zildžić had been beaten so violently that his face was unrecognizable and one eye had come out of its socket. He died shortly after having been brought back. Dragan Nikolić ordered his body to be taken away and two prisoners, Hasim and Alija Ferhatović, to bury it.

Dragan Nikolić came into the hangar next morning and approached Durmo Handžić. The latter was suffering intensely from a beating the night before and Dragan Nikolić prohibited prisoners from helping him. Durmo Handžić

1/ See witness statements 7.2; 7.3; 7.4; 7.5; 7.7; 7.8; 7.9; 7.10; 7.13; 7.14; 7.19; 7.35; 7.40; 7.42; 7.47; 7.48.

thereupon begged Dragan Nikolić to kill him to put an end to his suffering. Dragan Nikolić answered that a bullet was worth more than Durmo Handžić's life, that it would be wasted on him and that he should suffer before dying. Durmo Handžić died shortly afterwards. He was buried the same day by Hasim and Alija Ferhatović.

(b) Murder of Mevludin Hatunić 2/

7. Mevludin Hatunić, his wife and daughter were interned in the Sušica camp in early July 1992. Mevludin Hatunić reportedly offered his home to a Serb guard in return for his family's release. He was authorized to accompany the guard to his house for that purpose and then returned to the camp. This was between 3 and 7 July 1992. That same evening, Dragan Nikolić announced to the camp prisoners that, after having handed over his home, Mevludin Hatunić had made a comment to the effect that he would be waiting for a chance to get even. Dragan Nikolić then struck Mevludin Hatunić. The following morning, Dragan Nikolić again beat him until he lost consciousness. Later, Dragan Nikolić returned, saw that Mevludin Hatunić had regained consciousness, and beat him savagely for the third time. Mevludin Hatunić died from his injuries. His body was put in a plastic bag by one of the Ferhatović brothers and removed from the hangar.

(c) Murders of Rašid Ferhatbegović, Dževad Šarić, Muharem Kolarević and Ibrahim Zekić 3/

8. According to a number of witnesses, one night, probably that of 23 to 24 June 1992, Rašid Ferhatbegović, Dževad Šarić, Muharem Kolarević and Ibrahim Zekić were taken from the detainees' hangar by several guards including Goran Tešić. Some detainees saw Dragan Nikolić follow the prisoners out and heard his voice. Dževad Šarić and Muharem Kolarević were the first to be taken out. The hangar doors were closed again immediately. For about 30 minutes, the detainees heard screams of pain. Thereafter they heard gunshots, following which Goran Tešić asked Hasim and Alija Ferhatović to come out. The latter saw the bodies of Muharem Kolarević and Dževad Šarić, which seemed to have bullet wounds in the chest. Dragan Nikolić then ordered the Ferhatović brothers to put the bodies on a stretcher and take them behind a warehouse, where they could not be seen from the camp entrance. They then came to where Dragan Nikolić, Goran Tešić, another guard named Djuro, and Dragan Nikolić's brother were sitting with others. Goran Tešić told them: "Hold on a minute, you're going to get another".

9. Goran Tešić ordered Alija Ferhatović to go and get Ibrahim Zekić. Goran Tešić had him sit down on a metal chair and questioned him. Goran Tešić then asked another guard to give him his weapon and once he had it, shot Ibrahim Zekić twice, who fell from the chair. Goran Tešić thereupon ordered the Ferhatović brothers to take Ibrahim Zekić away. When they returned to where

---

2/ See witness statements 7.6; 7.16; 7.34; 7.41.

3/ See witness statements 7.2; 7.3; 7.4; 7.6; 7.8; 7.9; 7.10; 7.12; 7.13; 7.14; 7.19; 7.35; 7.39; 7.40; 7.42; 7.43.

they had left the bodies of Muharem Kolarević and Dževad Šarić, Muharem Kolarević's body was no longer there. They brought this to the attention of Goran Tešić. The prisoners who were in the hangar heard the guards yell: "Call the police, they're escaping". The police arrived some 15 minutes later and entered the hangar accompanied, according to some detainees, by Dragan Nikolić and Goran Tešić. When Rašid Ferhatbegović looked up, one of the police officers pointed at him and asked him if he was the one who had escaped. Goran Tešić replied: "Yes". Rašid Ferhatbegović was taken outside and the prisoners then heard a gunshot.

Towards 5 a.m., Dragan Nikolić came into the hangar and called Hasim and Alija Ferhatović. They went over to the toilets where they found the body of Muharem Kolarević. He was slumped over a barbed wire fence. Traces of blood led from where his body had been left the night before. Even though he seemed to be dead, Goran Tešić fired another bullet into the body. Hasim and Alija Ferhatović carried the body to where they had left the other bodies the previous evening. There they found Rašid Ferhatbegović's body, with a bullet in the middle of the forehead.

Hasim and Alija Ferhatović and Redjo Čakišić buried the bodies of those prisoners on 24 June 1992.

(d) Murder of Ismet Dedić 4/

10. Around 6 July 1992, Dragan Nikolić called Ismet Dedić out of the detainees' hangar. He closed the door and the detainees thereafter heard Ismet Dedić scream. Shortly after, Dragan Nikolić opened the hangar door and ordered two detainees to drag Ismet Dedić inside. The latter was seriously wounded and died a little while later. His body was put in a plastic bag and carried away by other detainees.

2. Inhumane acts

(a) Inhumane acts committed against Galib Musić 5/

11. Dragan Nikolić committed serious physical assaults against Galib Musić in Sušica camp over a seven-day period. It is alleged that Dragan Nikolić:

> "Kicked him and beat him with a metal pipe [...] Musić was beaten to unconsciousness each time. The beatings appeared to become more severe with each day. Shortly before the last beating, Musić regained consciousness and was asking for water. He was not given any water, food, or medical attention during the entire time."

Galib Musić died as a result.

4/ See witness statements 7.6; 7.8; 7.16.

5/ See witness statements 7.6; 7.16; 7.34; 7.41.

(b) Inhumane acts committed against Sead Ambešković 6/

12. Dragan Nikolić and other guards committed physical assaults against Sead Ambešković in Sušica camp using axe handles, iron bars, wooden bats and rifle butts. According to Sead Ambešković's testimony, "as a result of [the] beatings, the back of my head was cut, four teeth on the left side of my mouth were knocked out, and three ribs were broken".

(c) Inhumane acts committed against Redjo Čakišić 7/

13. When he arrived in Sušica camp, Redjo Čakišić was told by Dragan Nikolić and the camp guards: "Look how you ended up by voting for Alija [Izetbegović] and the SDA party". According to his testimony at the hearing, Redjo Čakišić was called out by Dragan Nikolić one night. Dragan Nikolić told two men who were waiting outside: "Here, I brought you something for dinner". The two men beat Redjo Čakišić in the back with rifle butts and kicked him in the stomach as Dragan Nikolić was leaving.

(d) Inhumane acts committed against Hasna Čakišić 8/

14. On three occasions the guards called out Hasna Čakišić for interrogation. According to the record, the 68-year-old victim was slapped and beaten on her hands with a truncheon to force her to reveal the whereabouts of her son. Dragan Nikolić participated in this ill-treatment.

15. Generally speaking, civilians were detained in Sušica camp under inhumane conditions, especially as regards hygiene, health, safety and nutrition. 9/ Included in the approximately 500 civilians were women, children and elderly people. The detainees were crammed into a hangar with practically no ventilation and had to sleep on the concrete floor. They were given only one daily ration of food, and even that was usually spoiled. They were infrequently allowed to use the toilet outside and had to use a single bucket in the hangar for their bodily functions. No medical care was provided. Certain prisoners were specifically appointed to control the hangar. The detainees lived in constant fear for their lives, especially at night.

> "During the night everybody waited for the day to come because day meant going out to work, not seeing what was happening. The maltreatment and suffering was a bit less severe, while the night was the night of horror." 10/

6/ See witness statement 7.3.

7/ See witness statement 7.7.

8/ See witness statement 7.6.

9/ See all statements.

10/ See Transcript of 10 October 1995, p. 37.

Elderly people were not spared this inhumane treatment. As one witness described:

> "She [a woman more than 75-years-old] wanted to go to the toilet, they would not allow her, and then Dragan Nikolić came and said: 'Bind her', so they bound her hands and feet. They tied ropes around her hands and feet so that she could not actually go to the toilet and she had to urinate in the room where we were." 11/

16. In addition to the four victims mentioned above, the indictment alleges that Mevludin Hatunić, Ismet Dedić and Fikret "Čiče" Arnaut were victims of inhumane acts (counts 3.6, 8.6, 11.3). As Dragan Nikolić is also charged with the murder of Mevludin Hatunić and Ismet Dedić, the relevant acts are described under Section II.A.1, Murder. As Dragan Nikolić is also charged with torturing Fikret "Čiče" Arnaut, the relevant acts are described under Section II.A.3, Torture.

3. Torture

(a) Torture of Fikret "Čiče" Arnaut 12/

17. Fikret "Čiče" Arnaut was allegedly assaulted by Dragan Nikolić on numerous occasions. Witnesses related how on one occasion, Dragan Nikolić came into the hangar and, while shouting to the women, "You are not here because of me, but because of him. He wanted to rape my mother and now we will rape you", forced Fikret "Čiče" Arnaut to put his hands behind his back and kneel on the floor, spreading his knees open. Dragan Nikolić kicked Fikret "Čiče" Arnaut in the stomach and lower back. Dragan Nikolić forced Fikret "Čiče" Arnaut to tilt his head back and he put a bayonet into his mouth. Witnesses saw blood on Dragan Nikolić's bayonet. Later, Fikret "Čiče" Arnaut was spitting and vomiting blood. He was heard begging, "Dragan, do not beat me to death, kill me with a bullet", to which Dragan Nikolić answered: "No, a bullet costs 5 DM and you are not worth half a cigarette". Fikret "Čiče" Arnaut was also taken outside and beaten by Dragan Nikolić who was wearing brass knuckles. According to one eyewitness, at some point:

> "Arnaut could no longer get up [...] He was covered with blood on his chest and his face was swollen. It appeared as though many of Arnaut's bones were broken".

11/ See Transcript of 13 October 1995, p. 13.

12/ See witness statements 7.2; 7.14; 7.16; 7.34; 7.40; 7.42; 7.44; 7.50.

(b) Torture of Mubin Musić 13/

18. Mubin Musić was mistreated while he was in Sušica camp. Once, when he was outside the hangar, Dragan Nikolić put a bayonet into his mouth, while constantly insulting and questioning him.

(c) Torture of Suad Mahmutović 14/

19. Suad Mahmutović was allegedly beaten repeatedly by Dragan Nikolić. Several witnesses, including the victim, asserted that during one beating seven of his ribs were broken. Another time, Dragan Nikolić kicked him in the face with his boots and hit him with a baton, gashing open his face. According to the witness:

> "On another occasion, Nikolić walked up to me while I was in the hangar. He told me to open my mouth. He put a cocked pistol in my mouth and told me to admit my neighbor had a weapon. I feared for the safety of others and could not lie. He pulled the trigger. It was then that I learned the gun was not loaded."

It appears to the Chamber that several other victims of inhumane acts or torture committed by Dragan Nikolić in Sušica camp have not been identified as such in the indictment.

4. Imprisonment of civilians

20. According to the written statements as well as the oral testimony presented to the Chamber large numbers of people were detained at Sušica camp during the period 1 June to 30 September 1992. The regular population of the camp is said to have been about 500 persons. The majority of the detainees were men but women and children were also part of that regular population. Over the entire period in question, 8,000 people are said to have been detained at Sušica camp in total. 15/

All the witnesses who testified to having been detained at Sušica camp emphasized that, at the time of their arrest, they had not been participating in a resistance movement against the authorities who had seized power in Vlasenica and who were responsible for the camp. It does not seem that such a movement could have taken shape in the Vlasenica region, where the detainees were locals, during the period in which the camp was operational. The arrests seem to have taken place only after the population had been totally disarmed. Thus it would appear that the establishment of Sušica camp was aimed at detaining a defenceless civilian population which was not organized into a resistance movement.

13/ See witness statement 7.13.

14/ See witness statements 7.3; 7.8; 7.12; 7.14; 7.42; 7.43.

15/ See statement of Mr. Gow.

5. Persecution on religious grounds

21. The imprisonment of civilians under particularly inhumane conditions could, considering the relevant parts of the record, constitute an act of persecution, since it seems to have been motivated solely by a discriminatory intent based principally, if not exclusively, on the religious characterization of the targeted population. It appears from the oral testimony that the camp population was exclusively Muslim.

6. Appropriation of property and plunder

22. Many witnesses have provided evidence of a system of unlawful appropriation or plunder of property at Sušica camp. On arrival at the camp, detainees were forced to hand over items of private property, especially valuable items such as gold or jewellery. Dragan Nikolić is alleged personally to have supervised the confiscation of property from a small building which he used for interrogations.

There is also evidence that, before women were deported from Sušica camp, they had to sign a document stating that they were leaving the area voluntarily and that they were giving up their possessions. 16/

The Chamber considers that there are reasonable grounds for believing that the appropriations were not justified by military necessity and were carried out unlawfully and wantonly.

The Chamber further considers that the acts described above could also be considered as characterizing persecution on religious grounds and so be covered by Article 5 of the Statute.

7. Unlawful transfer of civilians

23. Under the supervision and on the orders of the accused, Dragan Nikolić, a large number of detainees are said to have been unlawfully transferred from Sušica camp to Batković during the summer of 1992. Dragan Nikolić is said to have organized the transfers, calling out detainees from a list of names and telling them that they were to be exchanged for Serbian prisoners. In actual fact, the detainees were transferred to Batković camp; they were forced to travel by bus with their heads down, their hands behind their heads. They were beaten and forced to sing "patriotic Serbian" songs. At Batković camp conditions were similar to those at Sušica camp, if not worse. 17/

As submitted by the Prosecutor, the Chamber considers that Dragan Nikolić may have committed grave breaches of the Geneva Conventions of 1949 - in particular of Convention IV - which fall within the Tribunal's jurisdiction pursuant to Article 2 of the Statute.

16/ See witness statements 7.1; 7.11.

17/ See witness statements 7.3; 7.4; 7.5; 7.12.

The Chamber, however, also considers that the same set of facts could be characterized as deportation and, accordingly, come under Article 5 of the Statute.

B. Type of responsibility arising out of Dragan Nikolić's position at Sušica camp

24. The relevant part of the record provides reasonable grounds for believing that Dragan Nikolić held the position of camp commander at Sušica camp. The witnesses based their conclusions upon an analysis of the distribution of tasks within the camp. The guards were subjugated to Dragan Nikolić's orders; nothing, apparently, could be carried out without his consent. The witnesses also referred to declarations by Dragan Nikolić himself proclaiming his sovereign power within the camp. According to corroborated testimony, he would publicly state, "I am here, the commander, God, the stick and the law". 18/

The indictment and supporting material show that Dragan Nikolić's responsibility for the crimes against identified persons could arise not only from his direct participation in such crimes (Article 7 (1) of the Statute) but also by virtue of his position of authority where the evidence suggests not direct involvement, but a failure to prevent such crimes, as is the case for counts 4, 5, 6, 7 and 18. This latter principle of individual responsibility for omission, long recognized under international criminal law, is reaffirmed by Article 7 (3) of the Statute of the Tribunal which provides:

> "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

However, with respect to the counts of the indictment concerning crimes committed against a group of persons (counts 20 to 24), it should be noted that the reference to Article 7 (3) is less pertinent. Dragan Nikolić's position of authority in the Sušica camp makes him responsible not through his subordinates but for his own acts where imprisonment, appropriation, deportation, persecution and inhumane acts related to the very conditions of detention are concerned.

III. APPRAISAL OF THE GENERAL CONTEXT IN WHICH THE CRIMES ARE ALLEGED TO HAVE BEEN COMMITTED

25. The Chamber has noted the alternative presentation in the indictment of the legal characterization of the crimes. On the basis of the relevant parts of the record, the Tribunal's jurisdiction may conceivably be founded on Articles 2 or 3 of the Statute. However, without prejudice to the determination of the Judges at an eventual trial in this matter, the Chamber considers that there are

---

18/ See Transcript of 10 October 1995, p. 33.

reasonable grounds for believing that the crimes are more appropriately characterized as crimes against humanity.

A. Evidence which justifies appraisal of the crimes as crimes against humanity

1. The context in which crimes must be committed to be characterized as crimes against humanity

26. Article 5 of the Statute reads:

"The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts."

This definition specifies the type of crimes which, if committed under certain circumstances, constitutes crimes against humanity and, moreover, describes those circumstances.

The first circumstance referred to in the text is that of armed conflict. It is, in fact, common to Articles 2, 3 and 5 of the Statute, dealt with alternatively or cumulatively in the indictment, which is why it will be addressed below. The Appeals Chamber, thus confirming the findings of the Trial Chamber, considered that by requiring proof of an armed conflict, the Statute had narrowed the customary concept of crimes against humanity (Prosecutor v. Dusko Tadić (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at para. 141 (hereinafter Tadić Case and Decision on Appeal)). Since the judgement at Nuremberg, that concept has taken on a certain autonomy as there is no long any need to determine a link with a crime against the peace or a war crime.

The second circumstance, whereby crimes must be "directed against any civilian population" is specific to crimes against humanity. Set forth in broad terms in the Statute, it covers, according to prevailing opinion, three distinct components. First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly,

the crimes must, to a certain extent, be organized and systematic. Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity.

2. In 1992, did Dragan Nikolić through his alleged crimes participate in a systematic policy of a certain scale and gravity directed against a civilian population specifically identified as a group?

27. The evidence produced by the Prosecutor tends to show that in the spring of 1992, there was an authoritarian take-over by the Serbs in the Vlasenica region, which seems to have been largely facilitated by the intervention of elements of the Yugoslav People's Army ("JNA") and, in particular the Novi Sad corps, which at the time, was under the command of the Government in Belgrade. 19/ The eyewitnesses generally confirmed the existence of a new authoritarian power structure in Vlasenica and were unanimous in stating that discriminatory measures were directed against them as early as March and April 1992. Some banks imposed restrictions on accounts held by individuals of the Islamic faith. Laissez-passer were issued to control movement both within and outside the city. A witness said at the hearing:

> "A pass for leaving the Opstina of Vlasenica I never received, but I was given a pass to travel between my house and my land or farm." 20/

Lastly, the population was required to hand in any and all weapons. 21/

It follows from the relevant parts of the record that the civilian population subjected to such discrimination was identified by the perpetrators of the discriminatory measures, principally by its religious characteristics. The testimony is consistent on this point: the Muslim population was specifically, if not exclusively, targeted. The initial discriminatory measures seem to have been followed by still more radical ones: summary arrests, detention and torture at the police station, massive transfers of civilians to Sušica, and then to the Batković camp. On the basis of all the testimony, in September 1992 there remained only a few traces of the Muslim population of the Opstina of Vlasenica which, according to the 1991 census (the last census prior to the said events), amounted to 55.3 per cent of the total population.

The implementation of that discriminatory policy, commonly referred to as "ethnic cleansing", over the region of Vlasenica alone seems to have been so widespread as to fall within the Tribunal's jurisdiction under Article 5.

19/ See transcript of testimony of most witnesses and the statement of Mr. Gow, para. 173.

20/ See Transcript 10 October 1995, p. 9.

21/ See all witness statements.

28. However, the Chamber notes that these serious discriminatory acts do not seem to have been limited to the Vlasenica region. Camps like the one in Sušica were set up in a large part of the territory under Serb control in Bosnia. 22/ This policy of ethnic cleansing covered other parts of Bosnia from the spring of 1992 on. According to the expert witness:

> "The conduct of the spring 1992 attacks, including the manner in which the JNA and paramilitary groups deployed and treated the non-Serb population, was similar throughout Bosnia."

The statement of this witness shows the widespread nature of the criminal acts as well as the fact that they were organized at the highest level. According to the witness:

> "The speed and high level of coordination that these attacks required make clear that they were centrally coordinated and planned." 23/

The witness finished by saying:

> "In conjunction with Serbian political leaders and Serbian irregular units, the JNA conceived, planned, prepared and implemented an armed campaign in Bosnia that involved a systematic use of terror to establish the borders of a new Yugoslavia." 24/

According to all of the witnesses, Dragan Nikolić commanded the Sušica camp at Vlasenica from late May 1992 to late September 1992. On that basis, and in light of all the above, the Chamber considers that there are reasonable grounds for believing that he participated in such a policy and committed crimes against humanity, pursuant to Article 5 of the Statute.

B. The conditions for the application of Articles 2 and 3 of the Statute (grave breaches of the Geneva Conventions/ violations of the laws or customs of war)

1. The existence of an armed conflict

29. In certain cases, a condition for the Tribunal's competence ratione materiae is a state of armed conflict. Accordingly, the Chamber shall examine whether such a conflict existed in Vlasenica at the time that the crimes allegedly were committed.

The Appeals Chamber of the Tribunal in the Tadić Case noted that:

22/ See Transcript 9 October 1995, pp. 99, 100.

23/ See Statement of Mr. Gow, para. 133.

24/ Ibid., conclusion.

"[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized groups or between such groups within a State" (Decision on Appeal, at para. 70).

According to the statement of Mr. Gow, the expert witness, the armed conflicts in the former Yugoslavia began in the summer of 1991 and have continued, without peaceful settlement, to the present day. In this case, witnesses have provided testimony regarding the armed take-over of the town of Vlasenica, by both Bosnian Serbs and the JNA. Thus the Chamber considers that the crimes of which Dragan Nikolić is accused were committed in armed conflict.

2. Specific requirements for the application of Article 2 of the Statute

30. For Article 2 of the Statute, relating to the grave breaches provisions of the Geneva Conventions of 1949, to apply, the victims of the alleged crimes must be "persons ... protected under the provisions of the relevant Geneva Convention".

The Muslim population of Vlasenica was systematically disarmed and it does not appear that there was any resistance movement in the region. The Chamber considers that all the detainees at Sušica camp were civilians and therefore "protected persons" within the meaning of Article 4 of Geneva Convention IV of 1949.

In the Tadić Case, the Appeals Chamber affirmed that the Tribunal has jurisdiction under Article 2 of the Statute only in the context of an international armed conflict (Decision on Appeal, at para. 84). The relevant parts of the record tend to show that JNA forces from Novi Sad, under the control of the Government in Belgrade, took part in the occupation of Vlasenica after the Republic of Bosnia and Herzegovina had been recognized as an independent State.

The evidence of the expert witness, Mr. Gow, suggests, moreover, that the armed conflict in the territory of the former Yugoslavia may be viewed in its entirety as one "major armed conflict", that reportedly began in the autumn of 1991, with its aim "to establish [...] a new [...] State". 25/ This conflict involved several States. This Chamber considers on the basis of all of the foregoing that the armed conflict was international in character and that Article 2 may therefore be applicable.

25/ See Transcript 10 October 1995, p. 86.

3. Specific requirements for the application of Article 3 of the Statute

31. In the Decision on Appeal in the Tadić Case, the Appeals Chamber affirmed that the Tribunal has jurisdiction under Article 3 of the Statute to prosecute as violations of the laws or customs of war:

> "... all violations of international humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches' by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law ..." (Decision on Appeal, at para. 89).

The indictment against Dragan Nikolić contains 20 charges of violating the laws or customs of war under Article 3 of the Statute. All but one of those charges concern violations of Article 3 common to the four Geneva Conventions. In light of the decision of the Appeals Chamber, and in light of our finding that the detainees at Sušica camp were civilians and therefore "persons taking no active part in the hostilities", the Chamber considers that Article 3 of the Statute may apply in this case. The only charge not coming under common Article 3 of the Geneva Conventions concerns the prohibition on plunder of private property but that is specifically mentioned in Article 3 (e) of the Statute.

IV. INVITATION TO AMEND THE INDICTMENT

32. Based on this review of the indictment and in the light of all the material submitted by the Prosecutor, the Chamber would like to draw the Prosecutor's special attention to two points which it deems to be particularly important.

Having regard to the Rules, it is the prerogative of the Prosecutor, not the Chamber, to amend the indictment (Rule 50). Under these circumstances, the Chamber can only express its belief and invite the Prosecutor to amend the indictment accordingly, should he share such belief.

A. Rape and sexual assault

33. From multiple testimony and the witness statements submitted by the Prosecutor to this Trial Chamber, it appears that women (and girls) were subjected to rape and other forms of sexual assault during their detention at Sušica camp. 26/ Dragan Nikolić and other persons connected with the camp

---

26/ See Transcript 10 October 1995, pp. 36, 45, 73; 11 October, pp. 17, 25, 55, 62; 12 October, pp. 5, 17, 18, 55, 56, 83, 107, 108; Statements 7.3 at 8; 7.29 at 4; 7.32 at 3, 4; 7.34 at 4; 7.37 at 3, 4; 7.38 at 2; 7.39 at 2; 7.40 at 5; 7.46 at 3, 4.

are alleged to have been directly involved in some of these rapes or sexual assaults. These allegations do not seem to relate solely to isolated instances.

The Trial Chamber feels that the Prosecutor may be well advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolić with rape and other forms of sexual assault, either as a crime against humanity or as grave breaches or war crimes.

Without prejudice to any subsequent decision by the Judges at trial, and having regard to the special provisions on this subject contained in the Rules, the Chamber considers that rape and other forms of sexual assault inflicted on women in circumstances such as those described by the witnesses, may fall within the definition of torture submitted by the Prosecutor.

B. "Ethnic cleansing" and genocide

34. It emerged on the basis of the record that the policy of discrimination implemented at Vlasenica, of which Dragan Nikolić's acts formed a part, was specifically aimed at "cleansing" the region of its Muslim population.

In this instance, this policy of "ethnic cleansing" took the form of discriminatory acts of extreme seriousness which tend to show its genocidal character. For instance, the Chamber notes the statements by some witnesses which point, among other crimes, to mass murders being committed in the region. 27/

More specifically, the constitutive intent of the crime of genocide may be inferred from the very gravity of those discriminatory acts.

That intent, according to some of the eyewitnesses at the hearing, was expressed by the accused himself. Dragan Nikolić reportedly said, "You Muslims never existed, you [...] will never exist, I will eradicate you, I will cut your throats, I will butcher you all". 28/

The Chamber considers that the Tribunal may possibly have jurisdiction in this case under Article 4 of the Statute. It would therefore invite the Prosecutor to pursue his investigations, if feasible and advisable, with a view to indicting Dragan Nikolić for complicity in genocide or acts of genocide.

V. ATTEMPTS TO SERVE THE INDICTMENT

35. The Chamber notes the efforts by the Prosecutor to effect service of the indictment and the subsequent warrants of arrest.

27/ See Transcript 11 October 1995, pp. 87, 97; 12 October, pp. 45, 60.

28/ See Transcript 11 October 1995, p. 55.

On 4 November 1994, the day the indictment against Dragan Nikolić was confirmed, two warrants for his arrest were issued, one addressed to the Republic of Bosnia and Herzegovina, the other addressed to the Bosnian Serb administration in Pale in accordance with Rules 2 (A) and 55.

On 7 November 1994, the Registrar of the Tribunal forwarded the warrant addressed to the Republic of Bosnia and Herzegovina to the relevant authorities in Sarajevo. On 15 November 1994, the Registrar received official notification that the Republic of Bosnia and Herzegovina was unable to execute the arrest warrant due to the fact that Dragan Nikolić resides in the town of Vlasenica, which was stated to be "temporary occupied territory controlled by aggressors".

On 17 November 1994, the warrant addressed to the Bosnian Serb authorities was physically handed by an official of the Tribunal to members of the Bosnian Serb administration in Pale, including Mr. Koljević, the declared vice-president of the Bosnian Serb administration.

On 2 March 1995, the Prosecutor sought to advertise the indictment in newspapers having wide circulation in the territory, as provided for in Rule 60. Accordingly, on 13 March 1995, the Registrar forwarded to the Republic of Bosnia and Herzegovina a request for publication. A similar request was also forwarded the same day to the Bosnian Serb administration in Pale.

An article announcing the indictment against Dragan Nikolić was published in the newspaper Oslobodenie, the largest daily newspaper circulating in the Republic of Bosnia and Herzegovina on 8 April 1995. In addition, details of the indictment were broadcast repeatedly on Radio and Television of Bosnia and Herzegovina on 7 April 1995.

There has been no response from the Bosnian Serb administration concerning its willingness or ability to execute the warrant of arrest issued against Dragan Nikolić.

VI. DISPOSITION

36. FOR THE FOREGOING REASONS and

Pursuant to Rule 61 of the Rules of Procedure and Evidence,

Pursuant to the confirmation of the indictment by Judge Odio Benito dated 4 November 1994,

Pursuant to the decision of 16 May 1995 by which the same Judge ordered the Prosecutor to submit the case to the Trial Chamber,

And following the hearings of 9 to 13 October 1995 held at the seat of this Tribunal,

THE TRIAL CHAMBER UNANIMOUSLY:

DETERMINES that there are reasonable grounds for believing that Dragan Nikolić committed the offences with which he is charged in the indictment issued against him by the Prosecutor dated 1 November 1994,

CONFIRMS therefore this entire indictment comprised of 24 counts as described above,

ISSUES an international arrest warrant against Dragan Nikolić and STATES that such warrant shall be transmitted to all States,

TAKES FORMAL NOTE of the efforts by the Prosecutor to effect service of the indictment and STATEs that the failure to effect service is due wholly to the failure or refusal of the Bosnian Serb administration in Pale to cooperate.

CERTIFIES this failure and INVITES the President of the Tribunal to notify the Security Council of the United Nations accordingly.

[Signed]

Claude JORDA
Presiding Judge

Dated this twentieth day of October 1995
The Hague
The Netherlands

[Seal of the Tribunal]